

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for the Construction of a New High Voltage Transmission Line in New Hampshire

Docket No. 2015-16

CITY OF CONCORD’S MOTION FOR REVIEW OF ORDER ON INTERVENTION

The City of Concord, by and through its attorneys, the Office of the City Solicitor, requests that the Site Evaluation Committee review and modify the decision of the presiding officer relative to the City of Concord’s intervention status in the above-captioned matter in accordance with RSA 162-H:4, V; RSA 541-A:32 and Site Rule 202.11(f), stating as follows:

I. BACKGROUND

1. On November 17, 2015, the City of Concord moved to intervene. On March 18, 2016, the presiding officer of the Site Evaluation Committee issued an Order which consolidates Concord’s intervention with other municipalities and materially limits Concord’s intervention in this matter. Order on Petitions to Intervene at 8. More specifically, the Order consolidates Concord in Municipal Group 3 (Southern Section) which consists of Holderness, Ashland, Bridgewater, New Hampton, Bristol, Canterbury, Pembroke and Deerfield. *Id.* As set forth more fully below, Concord has raised issues in this matter that are separate and distinct from those of other municipalities in Municipal Group 3 and throughout the entire State. Indeed, the proposed Northern Pass Transmission, LLC route has greater impact on Concord than any other municipality in New Hampshire. Notwithstanding Concord’s unique position in this matter, the Order requires Concord to join Municipal Group 3 and “designate a single spokesperson for the purpose of filing pleadings, conducting discovery, and for examining witnesses at evidentiary hearings.” This ruling adversely and materially limits Concord’s ability to address the proposed

Northern Pass Transmission, LLC route and its unique impact on Concord, and accordingly, must be modified to authorize Concord to independently represent and protect its interests.

2. Concord requests the Site Evaluation Committee to review and modify the decision of the presiding officer which combines Concord with other separate and distinct municipalities. As discussed in more detail below, such a requirement prevents Concord from protecting its interests which form the basis of its intervention. There is no question that this Order runs counter to RSA 541-A:32, IV and Site Rule 202.11(e) which provide that to the extent that a presiding officer imposes conditions on intervention, such conditions shall not be “so extensive as to prevent the intervenor from protecting the interest which formed the basis of the intervention.” The Order must be modified to authorize Concord to independently represent and protect its interests.

II. ANALYSIS

A. Unique Impacts On Concord

3. The proposed project has significant and unique impacts on Concord, and it is imperative that Concord have an adequate opportunity to fully address those issues in its pleadings and during the adjudicative hearing. The proposed facility is projected to run 8.1 miles through significant portions of Concord, and unlike much of the rest of the proposed Northern Pass route in the state, in Concord it will abut dense residential neighborhoods. Concord is concerned about the impact that the project will have on its character and property values as a result of the overhead lines and supporting structures. The visual and audio impacts of transmission lines and large structures are also of particular worry. The following provides an overview of some of the unique issues to Concord¹:

¹ As discovery has not commenced, this is not intended to be a complete list and may be modified.

(a) Population Density and Length of Route: Concord is the capital of New Hampshire, and has a population of 42,695, which equates to 36% of the entire population along the proposed route.² There are 8.1 miles of overhead lines proposed for Concord, which is approximately 6% of the proposed 132 miles of overhead route. There are only four municipalities that will be subjected to a greater distance of overhead lines in their communities (Dixville, Franklin, Whitefield and Stark). Concord needs the opportunity to independently explore the impact of the project's construction and operations on its population.

(b) Abutting Neighborhoods: The proposed route abuts a number of heavily populated neighborhoods in Concord, including McKenna's Purchase which has 148 condominium units. Some of the units at McKenna's Purchase are immediately adjacent to the proposed route. Concord needs the opportunity to explore and present evidence on the impact on properties, including property values and resulting noise from construction and operation of the project. For example, with respect to McKenna's Purchase, the proposal includes the relocation of a large berm that is used to reduce noise from nearby commercial properties (such as audible backup alarms on forklifts). Concord needs to ensure that the volume of noise will not increase due to the relocation of the berm.

(c) Height of Structures: According to the Northern Pass website, the most common height of the existing structures in the right of way in Concord are 43 feet. The average height of the relocated structures will be 88 feet, or twice the existing average height. Moreover, the application shows 120 structures over 90 feet in Concord, and 60 of those structures are proposed to be between 100-125 feet. The Concord route runs through residential, commercial and industrial zones. According to a September 25, 2012 study by the Appalachian Mountain Club,

² There are 31 municipalities along the proposed route, and using data from the 2010 census, those municipalities have a combined population of 117,518.

“Concord experiences the highest exposure with over 9000 acres having visibility of at least one tower.” Concord needs to address the specific scenic and the significant visual impact of those structures, as well as how it conflicts with Concord’s municipal goals. Concord has spent significant resources on projects throughout the City to bury power lines, and under its subdivision regulations, all new subdivisions are required to bury power lines. Concord needs to address the feasibility and cost for Northern Pass, LLC to bury the lines in all or portions of Concord.³

(d) Impact of Structures in Gateway Performance District: Two of the proposed structures will be 125 feet, and are located near Loudon Road which is Concord’s Gateway Performance District that provides an entrance into the easterly portion of Concord. The Department of Energy has stated that the proposed structures at this location will have an aesthetic/visual impact which increases current conditions in this area from “moderate” to “severe” which means that “the visual change would be very large, and in sensitive settings is likely considered unreasonably adverse by a casual observer.” This severe impact conflicts with the goals of Concord’s Zoning Ordinance. The Gateway Performance District was established to provide for well designed, large scale commercial developments that “are expected to adhere to high standards for appearance in order to ensure that the gateways to the City are attractive and functional. Buffering and screening for adjacent neighborhoods are of concern for development at the edges of this District.” The Gateway Performance District is a growth corridor that is actively developed, and has some of Concord’s highest valued properties due to its desirable

³ In March 2015, the Concord City Council appointed a subcommittee of its members to examine the effects of the project on Concord. The subcommittee met six times and took testimony from 50 witnesses. Representatives of Northern Pass, LLC attended the meetings. The subcommittee requested specific information from Northern Pass, LLC about the cost of burial in Concord, but it was never provided. The subcommittee concluded that the applicant had not adequately considered the alternative of burial of the line through Concord. The applicant has still not adequately considered that option. The Concord City Council requested the Office of the City Solicitor to intervene in the project application.

location. Concord needs to adequately address the impacts of the proposed structures in this area, and to conduct discovery on alternative options such as burying the lines in this location.

(e) Impacts of Structures at Turtletown Pond: The project also proposes the construction of structures at Turtletown Pond that the Department of Energy has stated will have an aesthetic/visual impact which increases current conditions from “moderate” to “strong.” Concord needs to adequately address these impacts in discovery and at the hearing, and also to fully evaluate alternative options such as burial in this location to avoid scenic impacts.

(f) Karner Blue Butterflies and Concord Pine Barrens: The proposed route bisects a lot that is owned in fee by Concord (Map 111, Block B1, Lot 4) that is believed to provide a habitat for the Karner Blue butterfly, which is listed as a federally endangered species and has been reintroduced in Concord through the release of captive reared butterflies in the Pine Barrens. Concord needs the opportunity to explore the potential impacts on the Karner Blue butterflies on its property, as well as other areas of Concord.

(g) Ownership Interests: Similar to the Society for the Protection of New Hampshire Forests, which was allowed to participate as a full party in the proceedings, Concord has a direct ownership interest in properties affected by the Project. The proposed route crosses through six lots that Concord owns in fee simple, as well as four lots on which Concord owns and manages conservation easements. Concord also owns and manages conservation easements on two lots that are located immediately adjacent to the proposed route. One of the parcels in the view shed is Oak Hill Road Conservation Area which has popular walking trails in the City. Concord needs to have an opportunity to address issues that impact the property it owns and manages.⁴

⁴ Concord owns the following lots in fee: (1) 263 Portsmouth Street (Map 113, Block 2, Lot 27); (2) Pembroke Road (Map 111, Block B1, Lot 4); (3) Spears Park (Map 122, Block 2, Lot 46); (4) Misty Oak Drive (Map 122, Block C1, Lot 19); (5) Oak Hill Road Conservation Area (Map 120, Block 1, Lot 16); (6) Turtle Pond Conservation Area (Map 118, Block F2, Lot 17); and (6) 65 Airport Road (Map 110, Block 1, Lot 6). Concord has conservation

4. These issues are unique to Concord. The other municipalities in Municipal Group 3 have separate and distinct issues. By way of example, Holderness is not crossed on the project route. Deerfield is unique because it includes the proposed terminal substation. Ashland Water and Sewer Commission has unique issues that include concerns about construction on land that contains its well field, aquifer and wastewater treatment facility. It is not realistic to expect Concord to subordinate its interests with other rural municipalities which in many cases have no similarities with Concord.

B. Discovery

5. With respect to discovery, Concord should not be combined with Municipal Group 3 for the purpose of propounding data requests. It is unworkable for Concord to attempt to coordinate with other municipalities (including all of their boards and commissions), many of which are not represented by counsel and will need to hold meetings in accordance with RSA chapter 91-A, the Right to Know law. Such a requirement could effectively force Concord's legal counsel to travel and attend a significant amount of meetings with unrepresented boards and commissions in an attempt to identify an agreed-upon set of data requests to submit to the applicant.⁵ Moreover, in the event that a consensus is not obtained, it could effectively eliminate Concord's ability to propound data requests.

C. Pleadings and Cross-Examination

6. It is necessary for Concord to independently file pleadings and cross-examine witnesses in order to adequately protect its interests. The requirement that a "spokesperson" be

easements that it manages at: (1) Fox Run Open Space (no Map, Block, Lot associated); (2) Blood Agricultural Easement (Map 121, Block 3, Lot 2); (3) Unutil Conservation Easement (Map 113, Block 2, Lot 11); and (4) Manchester Sand and Gravel Conservation Easement (Map 109, Block 4, Lot 12). Concord also owns and manages conservation easements on two lots that are located immediately adjacent to the proposed route: (1) Harold Turner Easement (Map 118, Lot 2, Block 39); (2) Reardon Conservation Easement (Map 118, Block 1, Lot 35).

⁵ As discussed below, this also raises legal and ethical issues for the Concord's legal counsel.

assigned to Municipal Group 3 effectively limits Concord's participation. It is unlikely that Concord's legal counsel can act as a "spokesperson" for Municipal Group 3. Under the City of Concord's Code of Ordinance, Section 30-2-8, the Legal Division is only allowed to "represent *the City* in all matters in which the City has an interest coming before any court or tribunal. . . ." (Emphasis added). The attorneys employed by the Office of the City Solicitor are not allowed directly or indirectly to engage in the private practice of law. *Id.* It would raise a number of legal issues for the Office of the City Solicitor to be designated as the "spokesperson" for Municipal Group 3 by filing pleadings and examining witnesses at the adjudicatory hearings to address concerns on behalf of other municipalities which are not directly related to issues in Concord.

7. The consolidation also raises issues under the Rules of Professional Conduct. The municipalities involved in Municipal Group 3 have potentially unique issues, and some of the municipalities may choose to make decisions for strategic or political reasons. Under the Rules of Professional Conduct 1.2(a), a lawyer is required to abide by a client's decisions concerning the objectives of representation. Under Rule 1.6, a lawyer is required not to reveal information relating to the representation of its client unless it receives informed consent. Under Rule 3.1, a lawyer is not allowed to bring or defend a proceeding or controvert an issue unless there is a basis in law and it is not frivolous. Under Rule 4.3, a lawyer is not allowed to give legal advice to an unrepresented person if the lawyer knows or reasonably believes that the interests of such a person are in conflict with the interest of their client. The requirement that the parties choose a "spokesperson" for filing pleadings and presenting cross-examination raises issues for those attorneys representing municipalities who may disagree with the proposed approach of other municipalities and is simply unworkable.

8. Based on the unique and important issues to Concord, one of the State's largest cities and capital, Concord should not be forced to file pleadings and present examination with other municipalities. Indeed, a review of previous dockets reveals that such a requirement is unprecedented. Municipalities have historically been allowed to participate in the adjudicatory process as full parties, and Concord has been unable to locate any cases on the Committee's website where municipalities were combined. *See, e.g., Application of Antrim Wind Energy, LLC*, Docket No. 2015-02 (order dated February 16, 2016); *Petition for Jurisdiction over Renewable Facility by Antrim Wind Energy, LLC*, Docket No. 2014-05 (order dated March 13, 2015); *Application of Antrim Wind Energy, LLC*, Docket No. 2012-01 (order dated May 18, 2012); *Application of Groton Wind, LLC*, Docket No. 2010-01 (order dated June 25, 2010); *Application of Laidlaw Berlin BioPower, LLC*, Docket No. 2009-02 (order dated March 24, 2010).⁶

9. The interests of justice and orderly and prompt conduct of the proceedings will not be impaired by allowing full intervention of Concord for purposes of conducting discovery, filing pleadings and conducting cross-examination. Concord may coordinate with other intervenors to the extent possible in order to reduce costs and prevent duplicative evidence. Concord also recognizes that its cross-examination will be limited during the adjudicative hearing to avoid duplicative testimony that has already been introduced by Public Counsel or other intervenors, and it will only address issues that impact Concord. In order to ensure efficiency of the process, the presiding officer can also make rulings to address issues both before and during the adjudicatory hearing.

⁶ In fact, in some of these matters, planning boards and conservation commissions were allowed to participate separately and fully.

III. CONCLUSION

10. For all of the foregoing reasons, Concord respectfully requests the Committee to allow Concord to participate in the proceedings as a full party. This case has significant implications for Concord, and the current intervention Order effectively eliminates Concord's statutory and procedural due process rights by denying it the ability to protect the interests which formed the basis of its intervention.

11. In accordance with Site 202.14, Concord has attempted to obtain concurrence from some of the primary parties, as well as the members of Municipal Group 3. Concord has been notified that Public Counsel and the New Hampshire Society for the Protection of Forests concur with the relief requested. With respect to Municipal Group 3, the Ashland Conservation Commission, the Town of Holderness, New Hampshire and Bridgewater concur. Bristol does not take a position. Concord has not yet received a response from the remaining municipalities (and its boards and commissions) in Municipal Group 3. The applicant does not concur.

WHEREFORE, the City of Concord respectfully requests that the Site Evaluation Committee:

- A. Allow Concord to participate in the proceedings as a full party for purposes of discovery, filing pleadings and cross examination; and
- B. Grant such other and further relief as may be just.

Respectfully submitted,

CITY OF CONCORD

By: 

March 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2016, a copy of the foregoing was sent by electronic mail to persons named on the Service List of this docket.

March 25, 2016

By:

A handwritten signature in black ink, appearing to read 'Danielle L. Pacik', written over a horizontal line.

Danielle L. Pacik, Deputy City Solicitor